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No. 06-254

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

BRENDA SLONE McGEE, individually,
And BRENDA SLONE McGEE, as executrix
of the estate of JAMES SLONE,

Petitioner,

v.

THOMAS WAYNE MARCUM,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a debt incurred through the entry of a state court judgment finding only negligence and "gross negligence" nondischargeable under the provisions of 11 U.S.C. § 523(a)(6)?

LIST OF ALL PARTIES

The list of all parties set forth at page ii of the petition is correct.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDER ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The list of citations set forth at p. 1 of the petition is correct.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The statement appearing at p. 1 of the petition is correct.

COUNTER-STATEMENT OF THE CASE

A Kentucky state court judgment was entered on April 22, 2002, against the respondent, Thomas Wayne Marcum ("Marcum") in a wrongful death action filed by the petitioner, Brenda Slone McGee ("Ms. McGee"), the widow of James Slone, who was killed in a mining accident in Floyd County, Kentucky. (Petition, App. pp. 21-24). The judgment found negligence and gross negligence. (Petition, App. pp. 22-23). The action against Marcum did not allege that he committed any intentional tort, and the court made no finding that he had committed an intentional tort. (Petition, App. pp. 21-24).

ARGUMENT

The opinion of the United States Court of Appeals for the Sixth Circuit is correct, there is no conflict between the

circuits, nor any other reason for this court to review this opinion, and this Court should not grant the pending petition for writ of certiorari.

The opinion and order of the bankruptcy court dismissing the underlying adversary proceeding explains the law applicable to this case with commendable brevity and clarity:

> The applicable law controlling this case is found in 11 U.S.C. 523(a)(6) and as interpreted by the United States Supreme Court in *Kawaauahau vs. Geiger*, 118 S.Ct. 974 (1998)[1] and the Sixth Circuit Court of Appeals in *In re Markowitz*, 190 F. 3d 455 (6th Cir. 1999) and *In re Romano*, 59 Fed.Appx. 709, 2003 WL 731723 (6th Cir. 2003).
>
> The burden is on the plaintiff to establish that Marcum desired the consequences of his action or that he knew the consequences were substantially certain to result from his actions. The Supreme Court's language in *Geiger* is clear that for a debt to be non-dischargable under 523(a)(6) it must be found to be an intentional tort.

(Petition, App. 16).

The Sixth Circuit opinion herein adopted this reasoning in its entirety, holding:

> Here, the district court applied *Geiger* and *Markowitz*, finding no issue of material fact as to whether Marcum committed an intentional tort. The allegations in the plaintiff's brief, including Marcum's knowledge of the dangerous conditions

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[1] Though not cited by the bankruptcy court, the official reference to this case is 523 U.S. 57.

> in the mine, and his willful violations of the FMSHA, do not rise to the level of intent required for an intentional tort. There is no evidence in the record that Marcum desired, intended, or was substantially certain that Slone's death would occur. The plaintiff never asserted any claim for an intentional tort, and the judgment against Marcum is for negligence and gross negligence only. Even though Marcum pleaded to a willful violation of the FMSHA,[2] this does not equate to the "willful injury" requirement enunciated in *Geiger*. Thus, there is no issue of material fact as to whether Marcum's actions caused a "willful and malicious injury" as required by § 523(a)(6) and as interpreted by *Geiger* and *Markowitz*.

(Petition, App. 6-7).

The Sixth Circuit correctly held that, because Marcum had not been accused of any intentional tort, the decision of the district court and the underlying decision of the bankruptcy court were properly decided. This court should not review that decision, both because it is correct, and because the plaintiff has not articulated any reason for this court to review its decision in the *Geiger* case, which is clearly on point and controlling.

The *Geiger* case involved a claim of medical malpractice in which a patient sought treatment from a physician for an infection of her foot. Though he knew that intravenous antibiotic treatments would be more effective, Dr. Geiger instead prescribed oral penicillin tablets to, as he alleged, reduce the cost of treatment. While Dr. Geiger was

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[2] Federal Mine Safety and Health Act, 30 U.S.C. § 820(d).

on vacation, other, presumably more able, physicians began a more aggressive plan of treatment, including the referral of the patient to specialists who had expertise to treat her condition. When Dr. Geiger returned from vacation, he discontinued all these treatments, and resumed the use of oral penicillin tablets. The result of his malpractice was that the infection spread, ultimately causing the patient's leg to be amputated. *Geiger*, supra, 523 U.S. at 59.

The jury found Dr. Geiger negligent, and awarded the patient approximately $355,000 in damages, which Dr. Geiger then sought to discharge in bankruptcy. *Geiger*, supra, 523 U.S. at 59-60. The bankruptcy court held the debt to be non-dischargeable, and that holding was upheld by the district court. The United States Court of Appeals for the Eighth Circuit, however, reversed the decision, holding that however reprehensible Dr. Geiger's actions were, they were done negligently, rather than as an actual attempt to harm his patient.

In reviewing the decision of the court of appeals, this Court then addressed the question of whether Dr. Geiger's outrageously negligent conduct rose to that necessary to meet the standards of Section 523(a)(6) of the Bankruptcy Code, and concluded that they did not.

The opinion stated:

> We confront this pivotal question concerning the scope of the "willful and malicious injury" exception: Does § 523(a)(6)'s compass cover acts, done intentionally, that cause injury (as the Kawaauhaus urge), or only acts done with the actual intent to cause injury (as the Eighth Circuit ruled)?

> The words of the statute strongly support the Eighth Circuit's reading.

Geiger, supra, 523 U.S. at 61 (footnote omitted).

> Section 523(a)(6) states:
>
> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

This Court held that the words "willful" and "malicious" modify the word "injury." This Court held that Section 523(a)(6) only provides for the non-dischargeability of debts that result from actions that were INTENDED to harm another entity or its property. It does not apply to debts arising from actions which were willfully done, but which were NOT intended to harm another person. *Geiger*, supra, 523 U.S. at 61-62. Section 523(a)(6) applies only where the harm itself is the motive for the action, NOT where the harm was an unintended consequence of a negligent act.

Ms. McGee attempts to distinguish the *Geiger* case by noting that the negligent conduct of Mr. Marcum led to his criminal conviction, just as she did in the underlying Sixth Circuit appeal. (Petition, p. 8). Ms. McGee claims that, because of this distinction, *Geiger* is inapplicable because it involves only "a malpractice judgment based upon simple negligence against her physician for improper treatment. No allegation was made of any type of criminal intent or action on the part of the physician in *Geiger*." (Petition, p. 7).

Ms. McGee goes on to note that the "statute which Mr. Marcum was convicted of violating is designed to prevent exactly the type of situation which occurred when Mr. Marcum willfully and illegally sent Mr. Slone under unprotected roof in an underground coal mine." (Petition, p. 8)

Ms. McGee has, unwittingly perhaps, defined the concept of negligence per se. Negligence consists of the owing of a duty by one person to another, and then failing to fulfill that duty.[3] Here, as in all negligence per se cases, the standard of duty is set by a penal statute, and the violation of that penal statute constitutes negligence per se under Kentucky law. *Alderman v. Bradley*, 957 S.W.2d 264, 267 (Ky.App. 1997).

There is no allegation that Mr. Marcum intended to harm Mr. Slone. In its opinion and order, the bankruptcy court accepted the parties' stipulation that the judgment entered against Mr. Marcum was for "negligence and gross negligence only" and that there "was never asserted any claim against Marcum for any intentional tort." (Petition, App. 17). The bankruptcy court went on to hold that "The criminal conviction herein establishes only a willful act by Marcum. This does not establish a wilful injury." (Petition, App. 17).

The allegation is simply that Marcum violated a duty owed to Slone. That duty was, as in *Alderman*, defined by a statute. Marcum and others were owners and operators

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[3] "[N]egligence can exist only if the appellee owed the appellant a duty. Stated differently, if no duty existed, there could have been no breach of a duty and therefore no actionable negligence." *Penco, Inc. v. Detrex Chemical Industries, Inc.*, 672 S.W.2d 948, 951 (Ky.App. 1984).

of a corporation that was in the business of mining coal. There were violations of the applicable provisions of the Federal Mine Safety and Health Act, 30 U.S.C. § 820(d). While there is no evidence in the record concerning motive, the natural assumption is that Marcum's motive was to mine more coal than could be mined by strict compliance with the act, or to mine it more cheaply, just as Dr. Geiger's reason for limiting his treatment of his patient was to reduce the cost of that treatment. Dr. Geiger was negligent, and Marcum was negligent. However, neither intended to hurt anyone.

Ms. McGee's citation of an older Supreme Court case, *Tinker v. Colwell*, 193 U.S. 473 (1904), brings the issues sharply in focus. In that case, a husband obtained a judgment against another man for having "criminal conversation" with his wife. This Court held that the very act of "criminal conversation" or adultery was a willful tort, committed with at least the legal fiction that the wife (who was presumed not to be competent to give consent) was not a willing participant, and therefore, an intentional tort. *Tinker*, supra, 193 U.S. at 481-82.

The opinion in *Geiger* clearly distinguishes the *Tinker* opinion, holding:

> *Tinker* thus placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding. That decision, we clarify, provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be "for willful and malicious injury."

Geiger, supra, 523 U.S. at 63.

In *In re: Markowitz*, 190 F.3d 455 (6th Cir. 1999), the Sixth Circuit recognized *Geiger* as controlling precedent, noting that, under the *Geiger* standard, a tortfeasor "must will or desire harm, or believe injury is substantially certain to occur as a result of his behavior." *Markowitz*, supra at 455, n.10. Here, there is absolutely no evidence that Mr. Marcum either desired to harm Mr. Slone or that he knew that an injury to Mr. Slone was "substantially certain." (Petition, App. 7).

Thus, *Geiger* states the applicable rule of law, and the fact that this case involves negligence per se does not change the rule at all. The petitioner waves the criminal conviction of Marcum as a bloody shirt, claiming that it entitles her to more than the state court awarded her: a judgment for negligence only. If this court were to accept the rationale offered by the petitioner, every case of negligence per se, including automobile cases in which one driver exceeded the speed limit or ignored a traffic signal, would automatically produce a negligence judgment that is non-dischargeable in bankruptcy, and that novel rule would fly in the face of the well-established case law set out herein.

CONCLUSION

This court should not grant the petition for certiorari, and should allow the Sixth Circuit opinion to stand.

Respectfully submitted,

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